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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. ~~852~~ 1016

UNITED STATES ALKALI EXPORT ASSOCIATION, INC.,
PITTSBURGH PLATE GLASS COMPANY (INC.),
CHURCH & DWIGHT CO., INC.,
DIAMOND ALKALI COMPANY (INC.),
DOW CHEMICAL COMPANY, INC.,
HOOKER ELECTROCHEMICAL COMPANY (INC.),
THE MATHIESON ALKALI WORKS, (INC.),
NIAGARA ALKALI CO.,
PENNSYLVANIA SALT MANUFACTURING CO.,
SOUTHERN ALKALI CORPORATION,
WESTVACO CHLORINE PRODUCTS CORPORATION, INC.
WYANDOTTE CHEMICALS CORPORATION,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

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FILED
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PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

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January 17, 1945.

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UNITED STATES ALKALI EXPORT ASSOCIATION, INC.,
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WESTVACO CHLORINE PRODUCTS CORPORATION, INC.
WYANDOTTE CHEMICALS CORPORATION,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI

Now comes Wm. Dwight Whitney, counsel for the Petitioners above-named and respectfully moves this Court for leave to file the petition for writ of certiorari, hereto annexed, under Section 262 of the Judicial Code (28 U. S. C. sec. 377), directed to the District Court of the United States for the Southern District of New York, to review an order of that Court, entered January 12, 1945, more particularly described in the petition, and for such other and further relief as may be just and proper.

WM. DWIGHT WHITNEY,
Counsel for Petitioners,
15 Broad Street,
New York, N. Y.

January 25, 1945.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

UNITED STATES ALKALI EXPORT ASSOCIATION, INC., PITTSBURGH PLATE GLASS COMPANY (INC.), CHURCH & DWIGHT CO., INC., DIAMOND ALKALI COMPANY (INC.), DOW CHEMICAL COMPANY, INC., HOOKER ELECTROCHEMICAL COMPANY (INC.), THE MATHIESON ALKALI WORKS, (INC.), NIAGARA ALKALI CO., PENNSYLVANIA SALT MANUFACTURING CO., SOUTHERN ALKALI CORPORATION, WESTVACO CHLORINE PRODUCTS CORPORATION, INC., WYANDOTTE CHEMICALS CORPORATION, *Petitioners,* *vs.* UNITED STATES OF AMERICA, *Respondent.*	No.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, United States Alkali Export Association, Inc., Pittsburgh Plate Glass Company (Inc.), Church & Dwight Co., Inc., Diamond Alkali Company (Inc.), Dow Chemical Company, Inc., Hooker Electrochemical Company (Inc.), The Mathieson Alkali Works (Inc.), Niagara Alkali Co., Pennsylvania Salt Manufacturing Co., Southern Alkali Corporation, Westvaco Chlorine Products Cor-

poration, Inc., and Wyandotte Chemicals Corporation, respectfully pray for a writ of certiorari to the District Court of the United States for the Southern District of New York, to review an order of that Court entered January 12, 1945, denying petitioners' motion to dismiss the respondent's complaint herein for lack of subject matter jurisdiction. A certified transcript of the record in this case is furnished herewith in accordance with Rule 38, par. 1, of the Rules of this Court.

STATEMENT

This case presents a question of jurisdiction under the Webb-Pomerene and Sherman Acts. It is a case of first impression. The precise question is whether a United States District Court exceeds its jurisdiction in entertaining a suit in equity initiated by the Attorney-General under the Sherman Anti-Trust Act[1] against an Export Trade Association formed under the Webb-Pomerene Export Trade Act[2], which suit involves only acts done by, or in alleged combination or conspiracy with, such Association, in the absence of a showing under § 5 of the Webb-Pomerene Act that the matter had been referred to the Attorney-General by the Federal Trade Commission.

The petitioners' position is that the provision of the Webb-Pomerene Act (§ 2) by which Congress entrusted to the Federal Trade Commission supervision and control over acts of export trade associations is so specific and comprehensive in its terms as to confer upon the Commission

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[1] Act of July 2, 1890, ch. 647, 26 Stat. 209, 15 U. S. C. §§1, 2 and 4.

[2] Act of April 10, 1918, ch. 50, §2, 40 Stat. 517, 15 U. S. C. §§62, 65.

exclusive jurisdiction in that field in the first instance, and to postpone any jurisdiction of the Attorney-General, and consequently of the District Court, until reference by the Federal Trade Commission to the Attorney-General.

The scheme of the Webb-Pomerene Act is that an immunity from the Sherman Act is provided to export associations formed under it, and to acts done by them; that there are then inserted *provisos,* four in number, phrased to preserve domestic trade from consequent restraint; that such *provisos* follow closely the phraseology of the Sherman Act; and that the policing of the whole is entrusted exclusively to the Federal Trade Commission, except that the Attorney-General may take action upon reference to him by the Commission.

The Attorney-General, in commencing this action (independently of reference by the Commission), was frank and forthright in advising the public that it was a case of first impression, and of a character which had not been undertaken by any of his predecessors during the quarter of a century since the enactment of the Webb-Pomerene Act in 1918.

The question is believed to be of unique public importance, in that it involves the regulation and control of the export trade of the United States, at a moment in our history when the future of that trade and the method of its regulation and supervision by the government is attracting universal attention.

The complaint is comprehensive in the sense that it presents the characteristic issues that would presumably typify any case in which the problem is whether the activities of a Webb-Pomerene export trade association have fallen outside the scope permitted by the Webb-Pomerene

Act, and within the *provisos* of that Act, which were carefully framed with a view to protecting the public policy represented by the other anti-trust laws.

No one of the acts of the other defendants is alleged to have been taken independently of the association, or outside of the scope of the agreements, combination and conspiracy to which the association is alleged to have been a party, and in which indeed it is alleged to have been the principal moving party. The general tenor of the whole pleading is that the head and center of the combination and conspiracy was in the Association itself and that it either directed, or at the very least was a participant in, every agreement and every act.[3] This makes it utterly impossible to disassociate any allegation of the complaint from the subject-matter which it would be appropriate for the Federal Trade Commission to undertake in carrying out its investigatory function under Section 5 of the Webb-Pomerene Act.

Petitioners' contention as to the Webb-Pomerene Act is *not* that it has repealed the expression of policy found in the Sherman Act, but that it has by §5 entrusted exclusively to the Federal Trade Commission the initial enforcement of that public policy (so far as concerns acts of export trade associations registered with that Commission under that Act).

THE WEBB-POMERENE ACT

(1) The Webb-Pomerene Act provides a special supervisory jurisdiction for the field of foreign commerce, to the

[3] A more detailed outline of the complaint is given in Appendix B to the brief.

extent that it might be occupied by export trade associations (registered with the Federal Trade Commission) and their agreements and acts.

(2) To the exception which the Webb-Pomerene Act thus generally carves out of the jurisdiction conferred by the Sherman Act, there are annexed *provisos*, four in number:

(i) That the association, agreement or act should not be in restraint of trade *within* the United States,

(restraint outside the United States being permitted by implication, and indeed being the very reason for the enactment);

(ii) That the association, agreement or act should not be in restraint of the export trade of any domestic competitor of such association;

(iii) That no act or agreement of the association should artificially or intentionally enhance or depress prices within the United States of the commodities of the class exported by such association,

(artificial and intentional enhancement or depression of prices outside of the United States being by necessary implication permitted);

(iv) That no act or agreement of the association should substantially lessen competition within the United States or otherwise restrain trade therein.

(i) and (iv) are the same in substance, and amount to a general proviso against restraint of trade within the United States. They follow either directly the language of the Sherman Act, or indirectly the gloss that has been put upon that statute by the decisions of this Court or by

the substantive provisions of the Clayton Act[4] and the Robinson-Patman Act.[5]

(ii) and (iii) are more specific provisos, both of which also flow naturally from the nature of the Webb-Pomerene Act. The purpose of the Act was to permit restraints of trade in foreign markets. Proviso (ii) forbids restraint of other Americans wishing to export, and proviso (iii) forbids artificial or intentional raising or depressing of prices within the United States.

The problem is as to what government agency or officer first administers the complex questions that arise out of this statute. That question is in our view answered by §5. In its first paragraph it spells out in detail the provisions for filing with the Federal Trade Commission of full data and information upon the export trade associations and their agreements and activities, and provides the penalties for their failure so to file. The definition of the subject-matters upon which information is to be filed is a wide one, requiring information

> "as to its organization, business, conduct, practices, management, and relation to other associations, corporations, partnerships, and individuals."

The second paragraph of §5 follows in identical language the substantive §2 *and entrusts to the Federal Trade*

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[4] The language of a characteristic section of the Clayton Act being "where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce." (Act of October 15, 1914, ch. 323, §7, 38 Stat. 731, 15 U. S. C. §18. See also 15 U. S. C. §13, §13a, §14).

[5] 49 Stat. 1526, 15 U. S. C. §13(a).

Commission the entire complex question of delimitation between the general exemption provided by the statute and the four specific provisos. We print in parallel columns in Appendix A the language of the substantive section (§2) and of the second paragraph of the procedural section (§5), from which it will be seen that there is no question arising under the substantive section which is not by the procedural section entrusted to the jurisdiction of the Federal Trade Commission.

JURISDICTION TO REVIEW

The date of the order of the District Court for the Southern District of New York sought to be reviewed was January 12, 1945.

Jurisdiction of this Court is invoked under Judicial Code §262 (36 Stat. 1162, 28 U. S. C. §377).

This Court has exclusive appellate jurisdiction in equity suits by the Attorney-General under the Sherman Anti-Trust law. Act of March 3, 1911, ch. 231, §291 (36 Stat. 1167, 15 U. S. C. §29, 49 U. S. C. §45). Grant of the common law writ of certiorari, as authorized by §262 of the Judicial Code, *supra*, is sought in aid of such exclusive appellate jurisdiction.

The grant of the writ under these unusual circumstances is respectfully sought

(1) to correct a claimed excess of jurisdiction by the Court below; and

(2) in furtherance of justice in a question of public importance.

See *In re 620 Church Street Corp.*, 299 U. S. 24, 26; *Holiday* v. *Johnston*, 313 U. S. 342, 348, n. 2; *In re Chet-*

wood, 165 U. S. 443, 462; *McClellan* v. *Carland*, 217 U. S. 268; *Union Pacific R. R. Co.* v. *Weld County*, 247 U. S. 282; *Spiller* v. *Atchison T. & S. F. Ry. Co.*, 253 U. S. 117.

QUESTIONS PRESENTED

1. Whether a District Court has jurisdiction of a complaint under §4 of the Sherman Anti-Trust Act when the complaint shows upon its face that the claims relate exclusively to acts done by, or under the leadership of, an Export Trade Association registered with the Federal Trade Commission under the Webb-Pomerene Export Trade Act, and there is no allegation that the Federal Trade Commission has referred findings and recommendations to the Attorney-General under §5 of the Webb-Pomerene Act for such action thereon as he may deem proper.

2. Whether the District Court (at suit of the Attorney-General) or the Federal Trade Commission has been entrusted by §5 of the Webb-Pomerene Export Trade Act with responsibility in the first instance to make the findings, within a single continuous chain of events inaugurated and directed by an Export Trade Association registered under that Act, as to which of the activities constituting such chain of events fall within the protection of the Act and which fall within its exclusory *provisos*.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

(1) Possible avoidance of a lengthy and burdensome trial,

(2) Which cannot clarify but may obscure the issue,

(3) Which is one exclusively of law, and

(4) Of a character most appropriate for determination at the threshold of litigation, viz. a question exclusively of jurisdiction, and

(5) Which while it remains unresolved will continue to lead, as it is now leading, to prolonged proceedings simultaneously in United States Courts and before the Federal Trade Commission,

(6) In a field (that of international trade) of which the public importance is permanent, and

(7) Of which the public importance is particularly outstanding at the present moment and will presumably continue to be so throughout the period that would otherwise be consumed in the trial, with the result that

(8) Postponement of the question must impair the plans of commercial men for a revival of post-war international trade through their continued uncertainty as to the fundamental law under which they may operate, and may likewise even

(9) Cast doubt upon Executive and possibly even Legislative decisions.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Court, directed to the District Court of the United States for the Southern District of New York, sitting in the Borough of Manhattan, City, County and State of New York, commanding said Court to certify and send up to this Court, on a day to be designated, a full and complete transcript of the record and of all proceedings in said

District Court had in this case, to the end that this case may be reviewed and determined by this Court; that the order of said District Court be reversed; that the complaint herein be dismissed; and that your petitioners be granted such other and further relief as may appear proper.

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January 17, 1945

BRIEF IN SUPPORT OF THE PETITION

OPINION BELOW

The opinion of the District Court (R. pp.) has not yet been officially reported.

ARGUMENT

POINT I

PUBLIC POLICY WOULD BE SERVED BY A PROMPT DETERMINATION OF THE FUNDAMENTAL ISSUE HERE PRESENTED.

As the question arises on a motion for judgment on the face of the complaint, before the filing of an answer, the material facts of the complaint must of course be *assumed* (for the purpose of the motion only) to be true as alleged.[6] The multiplicity and complexity of the items alleged to have constituted the means and methods of carrying out the allegedly unlawful agreement, combination and conspiracy, and of participation in them by the very numerous named defendants and "co-conspirators" (both domestic and foreign), necessarily foreshadow a long and expensive trial.[7]

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[6] The Petitioners, however, deny all material allegations of the complaint.

[7] Common experience in anti-trust litigation indicates that if the trial must be had before the fundamental jurisdictional question can be resolved by this Court, the intervening time must be measured not in months but in years. A generation ago the *Standard Oil*, *Tobacco* and *Steel* cases taught that a period of five to ten years was not an excessive estimate for the duration of an important anti-trust case. That that experience has not changed, is indicated by many recent examples, of which we need

Yet the period which must thus be occupied in the conduct of the proceedings will be precisely the period during which there will be the greatest need for the nation's plans in the field of international commerce to be free from legal doubts of a jurisdictional character.

Both governmental and commercial leaders must be laying their plans for the post-war era during the very years that would be consumed in the trial of this case on the issues of fact.

POINT II

THE ISSUE IS ONE OF PUBLIC IMPORTANCE AS BETWEEN THE JURISDICTION OF THE COURTS AND THE JURISDICTION OF A COMMISSION "APPOINTED BY LAW AND INFORMED BY EXPERIENCE".

The question falls within the ambit of the problem which has been recurrent before this Court since the growth of Federal administrative commissions and boards,—as to the extent to which in given cases the Congress has entrusted *exclusive* primary jurisdiction to a particular administrative body.

Our position is that the Federal Trade Commission is vested with exclusive jurisdiction *in the first instance* of

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only cite the *Aluminum* case in the same Southern District of New York; there the actual trial, although substantially uninterrupted, had entered its second year before the government rested. Special emphasis may also be attributed in this case to the inclusion as a defendant of an important company of a foreign allied nation (not among the moving petitioners), for whose benefit alone decent considerations of international courtesy, under prevailing conditions of international travel and communication, may indicate a special requirement of time for preparation.

the matters complained of in this case, and that the Attorney-General may take jurisdiction only after and in the event that the Federal Trade Commission refers the matter to him for action.

(A) The language of the Act is particularly strong in entrusting primary jurisdiction to the Commission and deferring the function of the Attorney-General.

The actual words of the Webb-Pomerene Act are unusual, in that

(a) the substantive provisions[8] open with a general rule of exemption from the anti-trust acts, and then by carefully phrased provisos (four in number) specifically articulate the areas of activity in which various substantive principles of the Sherman Act remain applicable as exceptions to the exemption; and then

(b) the relevant *procedural* section[9] follows and repeats word for word the language of the substantive section, including all of the provisos; but directs that in policing the provisos, it is the Federal Trade Commission that shall be entrusted with that duty, the Attorney-General only entering the picture under the following concluding sentence of such procedural section:

> "Upon investigation, if it [the Federal Trade Commission] shall conclude that the law has been violated, it may make to such association recommendations for the readjustment of its business, in order that it may thereafter maintain its organization and management and conduct its business in accordance

[8] §2, 15 U. S. C. §62.
[9] §5, 15 U. S. C. §65.

with law. If such association fails to comply with the recommendations of the Federal Trade Commission, said commission shall refer its findings and recommendations to the Attorney General of the United States for such action thereon as he may deem proper."

(B) Decided cases under other statutes leave the issue open to what extent the "primary jurisdiction" doctrine shall apply under each.

The question in each case is whether it falls within the class in which Congress has entrusted its particular subject-matter, at least in the first instance, to the fostering guardianship and control of a commission (*Dayton-Goose Creek Railway Company* v. *United States*, 263 U. S. 456, 478).

We recognize that this Court has been astute to guard against any loose accumulation of implied exceptions to the Sherman Act (*United States* v. *Borden Company*, 308 U. S. 188), while at the same time confining the Sherman Act to its appropriate fields (*Apex Hosiery Co.* v. *Leader*, 310 U. S. 469).

The Court below was of opinion that this case was governed by the decision under the Capper-Volstead Act[10] and the Agricultural Marketing Act[11] in the *Borden* case, 308 U. S. at pp. 203-206.

We believe that the *Borden* case is properly distinguishable in that the delegation of authority to the Secretary of Agriculture under the Acts there under consideration was not of the same comprehensive character as the delegation to the Federal Trade Commission by the Webb-Pomerene

[10] 42 Stat. 388, 7 U. S. C. §§291, 292.
[11] 50 Stat. 246, 7 U. S. C. §608.

Export Trade Act. As to the Agricultural Marketing Act, the case was relatively plain, as that Act required as a condition that the Secretary of Agriculture be a party to the agreements in question; and he was not. The Capper-Volstead Act, although stronger, was nonetheless of limited scope; and the section in question did not, as does the Webb-Pomerene Act, "cover the entire field of the Sherman Act" (308 U. S. at p. 206).

The vital distinction which we will submit, in the event that our petition for a writ is granted, is that under the Capper-Volstead Act the Secretary of Agriculture is concerned only with the activities of the Association as such, whereas under the Webb-Pomerene Act the Federal Trade Commission is concerned (under the specific *provisos*) with the whole effect upon interstate and foreign commerce not merely of the Association itself, and not merely of its own acts, but of its agreements with other parties and the acts pursuant thereto.

In the *Borden* case the alleged conspiracy was not merely between the Association and its members and associates; it was alleged to embrace its distributors and retailers also, so that the whole channel of distribution was tainted, and the Association was used as a mere excuse in the effort to defeat jurisdiction.

There can surely be no doubt but that where a statute does definitely entrust to a Commission exclusive primary jurisdiction of a given subject-matter, the jurisdiction of the Attorney-General and the Courts is necessarily replaced. *United States* v. *Pacific & Arctic Company*, 228 U. S. 87, was an express holding to that effect in so far as the counts under the Interstate Commerce Act were involved. As the agency charged with the primary duty of administering

the Act, it was for the Interstate Commerce Commission to determine in the first instance whether or not the activities of the defendants were in violation thereof. 228 U. S. 107-108.

The provisions in question in the *Pacific & Arctic* case were the same as those in the present case. 49 U. S. C. A. §12; at p. 370 footnote. They provided that the Commission should execute and enforce the Act in the first instance, and only then

> "upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute, under the direction of the Attorney-General of the United States all necessary proceedings for the enforcement of the provisions of this act, and for the punishment of all violations thereof; * * *".

This Court rejected the view that the criminal consideration should be paramount. The statute, it said,

> "is more regulatory and administrative than criminal."
>
> "And it would in our judgment be an erroneous view to take that the great problems which the act was intended to solve and the great purposes it was intended to effect should be considered of less consequence than the facility which should be given to some particular remedy, civil or criminal."

That the Court there upheld two other counts under the Sherman Act is of superficial significance only, for the Interstate Commerce Act did not purport to concern itself with the monopolistic activities of railroads. The terms of the Webb-Pomerene Act, on the other hand, embrace the

whole field of the Sherman Act and entrust that very field to the Commission—in cases in which one of its own Export Trade Associations is to be made a party and its activities are to be the subject of inquiry.

(C) This case also brings forward for serious consideration the application of the doctrine requiring exhaustion of administrative remedies before resort to the courts.

This Court has been astute to guard against an overhasty resort to litigation in cases in which it was the evident Congressional purpose that the issues should first be submitted to a regulatory commission appointed by law and informed by experience. *Myers* v. *Bethlehem Corp.*, 303 U. S. 41; *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113; *Gray* v. *Powell*, 314 U. S. 402; *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501; *National Broadcasting Co.* v. *United States*, 319 U. S. 190; *McLean Trucking Co.* v. *United States*, 321 U. S. 67.

This case brings before this Court problems bearing upon both fundamental doctrines—the "primary jurisdiction" doctrine and the "exhaustion of remedies" doctrine. The first is directly involved. The second is involved by analogy, for the Court will not overlook that there may be a real evil in conflicts of jurisdiction between the Federal Courts dealing at the suit of the Attorney-General with the same subject-matter which is being simultaneously considered by a Commission. We do not say that there can never be such concurrent jurisdiction; *cf.* §7 of the Clayton Anti-Trust Act, *supra* note 4, where it is expressly provided. Whether it should be implied where not provided, is quite a different question.

If the Attorney-General had some sort of inherent jurisdiction to enforce the Anti-Trust Acts, it would have been unnecessary for the Congress to confer it upon him or upon the district courts in respect of the Clayton Act.

We appreciate that the Department of Justice will argue that its jurisdiction must be all-pervasive, and that the "exhaustion of administrative remedies" doctrine applies only against individual litigants, and not against the Attorney-General. We recognize that this will often be the case. But we suggest that there is no "universal" (or shall we say constitutional?) provision that automatically lifts the Attorney-General above acts of Congress. Surely it must be an independent cause for inquiry in each case as to whether Congress has in fact intended to provide that the sort of litigation which the Attorney-General is especially qualified to conduct shall be deferred until after there shall have been a preliminary investigation and fact-finding by its duly appointed Commission.

(D) The question is of particular moment where foreign trade is concerned.

That there is a very real and genuine distinction between problems exclusively of domestic trade among the several states, on the one hand, and problems which interrelate with foreign and international trade, on the other hand, has long been recognized by this Court. *Atlantic Cleaners & Dyers* v. *United States*, 286 U. S. 427, 434; *Board of Trustees* v. *United States*, 289 U. S. 48, 57; *The Abby Dodge*, 223 U. S. 166, 176, 177; *Brolan* v. *United States*, 236 U. S. 216, 218, 222; *Weber* v. *Freed*, 239 U. S. 325, 329, 330; *Buttfield* v. *Stranahan*, 192 U. S. 470, 492;

It is certainly not inherently unreasonable to suppose that Congress might have intended the ordinary cumbersome procedure of administration of trade relations by benefit of injunction suits in Federal Equity Courts—a procedure first conceived in 1890—to give way to modern administrative procedural concepts, at least wherever acts or activities were involved in which a part was played by one of those Export Trade Associations whose creation Congress was specifically authorizing, and whose supervision Congress was specifically entrusting to the Federal Trade Commission.[12]

That even an established system of regulation in a narrower geographic area may be required to give way to a system of regulation provided by Congress for a wider geographic area, when the first is intermingled with the second, was strikingly evidenced by *United States* v. *South-Eastern Underwriters Association*, 322 U. S. 533. If an established system of local regulation may be required by a statute of merely general application to give way to a national system of regulation, *a fortiori* a national system of regulation may be required to give way to an international system.

And this case is stronger in other respects than the *South-Eastern Underwriters* case. There it was necessary to conclude that a form of commerce, long deemed to be essentially local in character, and to the needs of which local legislatures had been universally attentive, had been brought within the scope of interstate regulation by a different legislature (the national Congress). Here it is necessary only to conclude that Congress itself, in exer-

[12] As to the growing doubt of the superiority of Federal equity suits in many fields, compare the restrictions upon their use in such diverse fields as labor disputes and railroad reorganizations.

cising its own choice as between the requirements of interstate commerce and the requirements of foreign commerce, has directed that where the two are intermingled, a cause of action based upon restraints of interstate commerce alleged to have arisen incidentally out of conduct of foreign commerce shall await preliminary investigation by the regulatory body to which it has entrusted supervision over such foreign commerce.

In determining this Congressional intent, resort may further be had to the circumstances of the time and to the debates in Congress.

(E) The circumstances of the time of the enactment of the Webb-Pomerene Act and the debates in Congress are at least strongly indicative of an intent of Congress to entrust exclusive primary jurisdiction to the Commission.

(a) *As to the circumstances of the time when the Webb-Pomerene Act was adopted:* It is noteworthy that the country was then in a position strikingly similar to that in which it now finds itself,—in a most trying and dangerous period toward the end of a great World War, when although a powerful enemy had recently taken or was about to take the military initiative, there was a general confidence in the country that victory would not be too long delayed, and that therefore it was timely to settle the legal questions upon which must be founded the anticipated expansion of post-war international trade and commerce.

(b) *As to the expressions of the President and the debates in Congress:* Their phraseology is at least strongly indicative that Congress intended that it was in the Commission itself, and not in the Courts, that it should in the

first instance be determined whether an export trade association went outside the permissive area of the Act and entered the forbidden area of the Sherman Act:

(i) From President Wilson's Address to Congress in recommending the legislation that became the Webb-Pomerene Act (Cong. Rec., Vol. 54, Part 1, pp. 31, 32):

> "I shall not argue at length the desirability of giving a freer hand in the matter of combined and concerted effort to those who shall undertake *the essential enterprise of building up our export trade.* That enterprise will presently, will immediately assume, has indeed already assumed, a magnitude unprecedented in our experience. We have not the necessary instrumentalities for its prosecution; it is deemed to be doubtful whether they could be created upon an adequate scale under our present laws. *We should clear away all legal obstacles* and create a basis of undoubted law for it which will give freedom without permitting unregulated license. The thing must be done now, because the opportunity is here and may escape us if we hesitate or delay."[13]

(ii) From the preliminary report to Congress by the Federal Trade Commission entitled "Cooperation in American Export Trade." May 1916 (p. 9):

> "In order to make it difficult for export combinations even to attempt restraint of trade in the United States, the right to cooperate or combine should be limited to the export trade solely, *and administrative supervision should be provided to insure that such*

[13] Emphasis supplied in all quotations.

organizations are not used surreptitiously for restraining trade at home."

(iii) From the Senate Report No. 1056, 64th Cong., 2nd Sess., at pp. 3-4:

"Associations, when formed, may enter into agreements or conspiracies or perform acts beyond the territorial limits of the United States which may result in the destroying, seriously injuring, or affecting our commerce, foreign and domestic, by means other than by unfair methods of competition. It seems advisable, therefore, to the majority of the committee that the Federal Trade Commission should be clothed with full power to investigate, *so that they may determine* whether and to what extent the laws have been violated."

(iv) From the remarks of Mr. Graham of the Judiciary Committee of the House of Representatives (Cong. Rec. Vol. 55, Part 4, p. 3570):

"The bill is intended to enable half a dozen or more men engaged in the same line of business to organize an agency that will handle their product intended for export trade, to be used in that trade alone, and can not in any wise affect the question of prices in this country; and if it does and becomes an element in restraint of trade here or destructive to competition, the saving clauses of the bill will bring the corporation or association offending under the control of the Federal Commission, which can dictate the terms by which its business shall be perfected and made unobjectionable; and *in case of* failure of the corporation to observe those rules, then the offending association is turned over to the Attorney General."

(v) From Senator Pomerene (Cong. Rec., Vol. 55, Part 7, p. 7326):

> "* * * we have provided particularly that all the operations of these associations shall be subject to the jurisdiction and control of the Federal Trade Commission; and if in anywise they may be interfering with what may be regarded as fair competition, or if they may be violating the laws of the land —trust laws or others—then the Federal Trade Commission can investigate and make orders respecting the conduct of their business; *and if they fail to comply with these orders, then these matters may be certified over to the Department of Justice for such action as they may think proper.*"

In so far as apparent conflicts appear in the various Committee reports and Congressional debates, we therefore believe that they will show that the grounds upon which the conflicting views were reconciled were (1) that the provisos in §2 of the Act would suffice to keep the substantive provisions of the Sherman Act in full force and effect for the protection of domestic trade and American exporters, but (2) that the policy of enforcing such substantive provisions against Export Trade Associations would be in the hands of an administrative agency and that Court proceedings were only to be resorted to after that agency had sent the case over to the Attorney-General.

And there is modern interpretation to the same effect by an *independent* agency of the government (Pamphlet entitled "The Export Trade Act", issued in November 1935 by the Bureau of Foreign and Domestic Commerce of the Department of Commerce, referring at p. 1 to the provisos in the Webb-Pomerene Act):

> "Although there are restrictions in the Act which may seem burdensome, these were placed there to safeguard our traditional policy of open competition in industry.
>
> "If upon investigation by the Federal Trade Commission of an act of an export association it is deemed to be a violation of the law, the offender is not penalized but reminded of the fact and directed to amend its ways. *Only upon failure to comply* with the recommendations of the Commission will the matter be brought to the attention of and for action by the Attorney General."

And we understand from newspaper releases by the Federal Trade Commission that it is similarly interpreting its duties, for it has instituted proceedings in a number of fields to review the acts of the associations and their associated companies.

(F) There is a real risk of unseemly conflict between the decree of a court of equity and the order of the Commission.

The Commission's statutory authority, after investigation, is expressly to

> "make to such association recommendations for the readjustment of its business."

That such a recommendation may vary from, indeed may directly conflict with, the orders that a Federal District Judge may deem fit to include in his decree, appears obvious.

We ask this Court only to determine whether it may not have been true that this is a possible evil which in this case Congress was expressly seeking to avoid.

The final problem—to construe the statute—we petition for leave to submit to this Court.

Respectfully submitted,

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APPENDIX A

§ 2

Nothing contained in sections 1-7, inclusive, or section 15 of this title shall be construed as declaring to be illegal an association entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade, or an agreement made or act done in the course of export trade by such association,

p r o v i d e d such association, agreement, or act is not in restraint of t r a d e within the United States,

and is not in restraint of the export trade of any domestic competitor of such association:

Provided, That such association does not, either in the United States or elsewhere, enter into any agreement, understanding, or conspiracy, or do any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association

§ 5

Whenever the Federal Trade Commission shall have reason to believe that an association or any agreement made or act done by such association is in restraint of trade within the United States

or in restraint of the export trade of any domestic competitor of such association,

or that an association either in the United States or elsewhere has entered into any agreement, understanding, or conspiracy, or done any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association,

or which substantially lessens competition within the United States or otherwise restrains trade therein.

(Apr. 10, 1918, ch. 50, §2, 40 Stat. 517).

or which substantially lessens competition within the United States or otherwise restrains trade therein,

it shall summon such association, its officers, and agents to appear before it, and thereafter conduct an investigation into the alleged violations of law. Upon investigation, if it shall conclude that the law has been violated, it may make to such association recommendations for the readjustment of its business, in order that it may thereafter maintain its organization and management and conduct its business in accordance with law. If such association fails to comply with the recommendations of the Federal Trade Commission, said commission shall refer its findings and recommendations to the Attorney General of the United States for such action thereon as he may deem proper.

(Apr. 10, 1918, ch. 50, §5, 40 Stat. 517).

APPENDIX B

Outline of the Complaint.

The first four headings of the complaint (I. JURISDICTION AND VENUE, II. THE DEFENDANTS, III. THE CO-CONSPIRATORS, IV. NATURE OF THE TRADE AND COMMERCE INVOLVED AND BACKGROUND OF THE CONSPIRACY) are introductory merely and do not directly affect the question. They define and describe the nature and constituents of alkalis and the processes by which they are produced. And they name and identify the defendants, which are:

(1) The Alkali Export Association ("Alkasso").

(2) Eleven members of the Alkali Export Association.

(3) The California Association ("Calkex")—another Webb Act Association—and its two members.*

(4) Imperial Chemical Industries, Ltd. (ICI), which is the dominant chemical company in Great Britain, and its New York subsidiary of similar name.

They also name so-called "Co-Conspirators":

(1) American Potash & Chemical Corporation, substantially all of the capital stock of which has been seized by the Alien Property Custodian.

(2) Belgian Solvay and its New York subsidiary of similar name.

* The defendants referred to in (1), (2) and (3) were all moving defendants in the District Court.

(3) The German company, I. G. Farben.

Under V, "Violations of Law", it is alleged that

> "defendants Alkasso and ICI and those defendants who were members of Alkasso in 1924 * * * and the remaining defendants from the time of their respective admission as members * * *"

have been engaged in an unlawful combination and conspiracy. The theory is that the conspiracy consisted in joining the Association (Complaint par. 41). The acts then taken by the parties under the alleged leadership of the Association are then particularized. The particularized allegations of violations of law divide into three portions, with appropriate subject-headings appearing in the complaint itself:

(1) *Alleged international cartel agreements.*

Under the sub-paragraphs of paragraph 41, Alkasso, Calkex and "their respective members" are alleged to have agreed not to compete, and to accept assignment of marketing areas as their joint exclusive territory, and not to export to the territories assigned to the foreign companies, etc.

In par. 43 Alkasso and ICI are alleged to have agreed to refrain from exporting alkalies to the United States. Accordingly, says par. 44, Alkasso, "acting on behalf of itself and its members", entered into an agreement with ICI evidenced by a written memorandum attached to the complaint as Exhibit A. Allegations as to subsequent agreements by Alkasso with ICI throughout the years appear in pars. 44-52 and in the balance of the exhibits.

Finally, in par. 53, it is generally alleged that each of the member companies participated in the negotiation of

the agreements, accepted their benefits and obligations, and participated in carrying them out. They are followed by particularization of Alkasso as the party which

> "allocated to each of its member companies a certain percentage of the total exports of alkalies comprising the Alkasso quota."

This is followed by the allegation that Alkasso,

> "to assure compliance by its members with the several agreements which Alkasso had entered into with defendants ICI and co-conspirators Belgian Solvay and I. G. Farben",

maintained until 1940 its position as exclusive foreign sales outlet for its members.

(2) *Alleged restraints upon exports by domestic competitors.*

Alkasso is alleged to have sought, by causing its member companies to do certain alleged acts, to restrain the competition of domestic companies which would otherwise have been its competitors for export trade. To that end Alkasso is alleged, in pars. 55, 56 and 57, to have caused the organization of Calkex, and to have entered into an understanding with Calkex agreeing upon market quotas, etc. In par. 59, we are told that the means for checking up on developments abroad was through "the foreign agencies or representatives of Alkasso and ICI". So far as Alkasso's members were concerned, they acted under the direction of Alkasso, which "*required* its members to report to it the names of all independent exporters * * *". And Alkasso is then charged with having exchanged information with ICI.

In par. 60 comes the express allegation of concerted action to eliminate competition from independent manufacturers. "Alkasso and ICI have taken concerted action as part of the conspiracy herein alleged to eliminate competition from such independent manufacturers". And Alkasso "has offered to act as the agent to handle the exports of such independent manufacturers or to purchase all of their alkalis to be exported * * *". Thus is Alkasso charged with having acted (to quote the statute) "in restraint of the export trade of any domestic competitor of such association".

Par. 60 concludes that by the acts aforesaid "Alkasso has succeeded in gaining control of most of the export trade of such independent domestic manufacturers * * *".

Par. 61 purports to analyze "the principal obstacle" which Alkasso has encountered in this alleged wrongful undertaking. Such principal obstacle was presented by the sales by independent dealers or exporters who had purchased their supplies from its members or from independent manufacturers. Alkasso is alleged to have met the obstacle by causing its own officers, agents and representatives abroad to investigate and police the sales; by requiring its members to refrain from selling to such exporters; and by instructing its agents abroad to undersell such independent exporters and to disparage the quality of their products.

(3) *Alleged "Stabilization of Domestic Prices".*

These allegations relate principally to efforts to increase the price of caustic soda by taking an alleged excessive supply off the domestic market. The means are again "the agreements between Alkasso and ICI hereinabove set forth

and (by) their practices thereunder". Alkasso is charged with having systematically allocated quotas between its members, and when the members were entitled to receive increases in their quotas these were "given" to them by Alkasso. Reciprocally, reduced quotas were "accepted" by the defendant members, when Alkasso in its systematical allocation thought proper to reduce them.